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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 12

RAFAEL CORTES, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,

Petitioner,

—against—

BALTIMORE INSULAR LINE, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 752.

RAFAEL CORTES, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,

Petitioner,

—against—

BALTIMORE INSULAR LINE, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The complaint herein charges failure of the officers of the ship to give Santiago any medical attention, to obtain assistance from passing vessels, to provide heat and proper quarters, place him in a hospital room and to provide proper food or medicines (all of them alleged sins of omission), and that his death was caused by reason of the negligence of the defendant.

The suit was brought under Section 33 of the Merchant Marine Act of 1920, known as the Jones Act, and not under any State death statute or under the Federal death act, none of which could properly be applied under the facts alleged in the complaint.

On October 17, 1928, the day after sailing from Boca Grande, Florida, the officers of the ship first learned that Santiago felt ill. He was kept in the forecastle and not put in the hospital room aft, intended for contagious diseases, which required segregation from the crew, because he could get better care forward (R. 125). The weather on the voyage north was fine (R. 119). The temperature averaged about 80° until the afternoon of October 20th and thereafter until the vessel arrived in New York Harbor on the evening of October 21st, ranged from 60° to 78° (R. 217). The steamer arrived at the mouth of the Raritan River on October 21st at about 6:35 P. M. (R. 138) and lay all night at anchor and reached her dock at Cartaret, New Jersey, the following morning. An ambulance was summoned from the Staten Island Marine Hospital and arrived at 4:20 P. M. in the afternoon (R. 75). Santiago's case was diagnosed as lobar pneumonia, with consolidation on both sides, and he died the following day (R. 68).

The thermometer readings dispose of the charge of cold quarters and insufficient bedding. All the witnesses agreed that he had a blanket, described by one witness as heavy (R. 21, 50, 103). He had in addition a bed spread and two sheets and an extra blanket not used (R. 103, 200, 196, 156, 191).

The charge of lack of proper or insufficient food is disposed of by the undisputed testimony that he received a little coffee, soup, bread and orange juice.

The charge of failure to obtain aid from passing vessels or to obtain prompt medical assistance on arrival is disposed of under Point IV hereof.

We might add that it is not surprising that the officers diagnosed the trouble first as seasickness and then as grippe or malaria when we consider that the

temperature averaged 80° when Santiago first became ill and when both the master and third mate saw Santiago walking on deck on October 21st, the day of arrival off Staten Island (R. 123, 153).

POINT I.

A careful analysis of the decision in the case at bar and that in *Harris* v. *Pennsylvania Railroad Company*, 50 F. (2d) 866 (C. C. A., 4th Circ.), discloses that there is no conflict of decision or authority between the Circuit Courts of Appeals for the Second and Fourth Circuits in respect to Section 33 of the Merchant Marine Act of 1920.

In the case of *Harris* v. *Pennsylvania Railroad Co.*, 50 F. (2d) 866, the decedent fell overboard from a car float and was drowned. At the close of the plaintiff's case in the District Court defendant moved for a directed verdict which was granted by the District Judge, who held that it was the duty of the defendant to exercise reasonable diligence to save the deceased, but that even if there were lack of such diligence, nevertheless there was no evidence from which the jury could reasonably conclude that more diligent action on the part of defendant's servants could have saved their comrade's life. The Circuit Court of Appeals (4th Circuit) stated that two main questions were presented:

> "(1) Whether when the seaman fell overboard by reason of his own misfortune or carelessness, and without negligence on the part of any other member of the crew, the defendant owed him a duty to rescue him from his peril; and (2) if this

duty be found to exist, whether there was negligence on the part of the crew in failing to perform it" (pp. 867, 868).

The Court further stated that it had been referred to no decisions involving the bald question presented, although cases were cited in which the negligent failure of a ship's crew to save a drowning seaman had been treated as a material circumstance in determining the obligation of the vessel, and referred to *Salla* v. *Hellman* (D. C., S. D. Cal.) 7 F. (2d) 953, and *Newport News S. B. & D. D. Co.* v. *Watson* (C. C. A. 4th Circ.), 19 F. (2d) 832, 833.

In *Salla* v. *Hellman,* it was held that the failure of the Captain of the boat to attempt to rescue a member of the crew known to have fallen overboard was negligence and a recovery could be had under the Act of March 30, 1920.

In *Newport News Shipbuilding and Drydock* v. *Watson,* the Court held that where the engineer of a launch caused it to bump against a scow and a fellow employee fell overboard and was drowned, the engineer was negligent in having his back turned when the launch struck the scow, and also in failing to get the launch in motion in time to rescue the drowning man, and that his negligence rendered the employer liable under Section 33 of the Merchant Marine Act of 1920.

Therefore, in neither *Harris* v. *Pennsylvania Railroad Company* nor in the two above cases cited by the Court in the *Harris* case was the doctrine of maintenance and cure involved and none of them dealt with a case of illness, but each dealt with a case of accident, personal

injury, and negligence. All three cases were patently what are known in the law as "accident cases", "personal injury cases" and "negligence cases" as distinguished from cases of illness and cure.

It is true that the Court in the *Harris* case adverted to the rule of maintenance and cure in admiralty but such adversion was not at all necessary to its decision, and it had already been held that in personal injury cases arising out of accidental drowning, the shipowner owed a duty to the seaman to try to save his life.

Whatever, therefore, was said by the Court with reference to maintenance and cure was *obiter dictum* and not a necessary part of its decision, and therefore not binding even on that Court in a subsequent case and of course not binding on any other Court.

What the Circuit Court of Appeals for the Second Circuit in the case at bar held was that an action for failure to furnish cure in a case of illness was under the maritime law based upon contract and was not a personal injury case based on negligence, and therefore could not be based on Section 33 of the Jones Act. In its opinion the Circuit Court of Appeals said (R. 238):

> "At the conclusion of the evidence, the jury found for the plaintiff; and, since the record is not entirely barren of evidence to support some of the charges, we must take it that the defendant failed to give Santiago the care he should have been given during his illness. The evidence would not, in our opinion, sustain a verdict based on the theory that any affirmative acts of the defendant's agents caused his death, but it might justify a finding that the defendant omitted performance of its maritime duty to provide 'cure'

> to the sick seaman, in that it failed to land him at some port on the voyage north, or to furnish more expert medical treatment on board, or to get him promptly to a hospital on arrival of the vessel at the port of New York. We shall assume for purposes of our discussion a causal relationship between such omission by the defendant and the sailor's death."
>
> (We point out that the Court did not find but only assumed for discussion that there was any causal relationship between the omission of performance by the defendant and the death of Santiago.)

It held (R. 240) that the duty to provide cure is a contractual obligation and that non-performance thereof cannot be deemed negligence within the meaning of the Federal Employers' Liability Act and therefore of the Jones Act; that one, and perhaps the chief purpose of both, was to abrogate the fellow-servant doctrine in respect to injury or death resulting from tortious acts of the carrier's servants; and finally held (R. 242):

> "For reasons already stated, we are of opinion that the Jones Act does not provide a remedy for death resulting from an illness which occurred without fault on the part of the ship but was aggravated by a failure to perform the ship's maritime duty to provide cure. The paucity of authority on this question is itself somewhat persuasive that the statute should not be construed as the plaintiff contends. See *The City of Alexandria* (D. C. 17 F. 390, 395)."

When the two cases and the Statutes are thus carefully analyzed it will be seen that there is no conflict of

decision between the two courts calling for the intervention of this Court. Even if there be a conflict in reasoning, such would not call for review.

POINT II.

The Jones Act, Section 33, does not provide a remedy for death resulting from an illness occurring without fault on the part of the ship, even assuming that it was aggravated by a failure to perform the ship's maritime obligation to provide cure.

Under the admiralty law no remedy was given for death on the high seas until the Death on the High Seas Act was passed by Congress March 30, 1920 (41 Stat. 537) and the passage of Section 33 of the Merchant Marine Act of June 5, 1920, frequently known as the Jones Act. Likewise no remedy was given to a seaman for injuries caused by negligence of the officers or other members of the crew as distinguished from unseaworthiness of the ship. The whole purpose of the Jones Act was to give a remedy in such negligence cases and to abolish the fellow-servant rule in the case of seamen in "personal injury", "accident" or "negligence" cases, which had been ineffectually attempted in Section 20 of the Seamen's Act of 1915 (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372). It is clear that it was not the purpose of the Act to affect or deal in any way with the doctrine of maintenance and cure, which had an entirely separate basis in the admiralty.

Section 33 of the Jones Act provides as follows:

"That any seaman who shall suffer personal

injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

The relevant statute, regulating the right of action in cases of personal injury to or death of railway employees, referred to in the above statute, Section 33, is the Employer's Liability Act of April 22, 1908, Chapter 149, 35 Stat. 65, U. S. C. A., Title 45, Sec. 51, Section 1 of which provides:

"Every common carrier by railroad while engaged in (interstate)- commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65)."

The history in Congress of Section 33 of the Merchant Marine Act, amendment of 1920, or Jones Act, plainly indicates that there was no intent to change the doctrine of maintenance and cure or to change the maritime law in any way except in cases of *personal injury* or *death* arising out of *accident* aboard ship.

If Congress had so intended it would have been a simple matter in drafting the Jones Act to have added the words "or illness" to make the section read:

> "That any seaman who shall suffer personal injury *or illness* in the course of his employment * * *; and in case of the death of any seaman as a result of any such personal injury *or illness* * * *."

The omission of the word "illness" from the statute was certainly not accidental. What Congress and the proponents of the Section intended was only that seamen should be placed in as favorable a position as railroad employees in personal injury or accident cases, based on tortious negligence.

The amendment of 1920 (Section 33) was proposed by the Senate to the original House of Representatives bill (H. R. 10378) and was adopted with no material changes. The language was proposed by Mr. Furuseth who was attending hearings before the Senate Committee in his capacity as President of the International Seamen's Union of North America. The following is an excerpt from the report of the hearing held on February 27, 1920 (Commerce Committee Hearings, 66th Congress, p. 1712):

> "The Chairman: (Senator Jones) 'What is the amendment you suggest to Section 20 (of the Seamen's Act of 1915).'

Mr. Furuseth: 'That any seaman who shall suffer personal injury in the course of his employment, may at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. And in the case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. That is the amendment.'

Senator Fletcher: 'In other words under the the common law if a sailor should step through an open hatch that had been left carelessly open, he would have no remedy.'

Mr. Furuseth: 'He would have no remedy.'

Senator Fletcher: 'And now you want to change that so he would have a remedy provided that his own negligence did not bring about the injury.'

Mr. Furuseth: 'That is it exactly.'"

The report of the Managers for the House of Representatives in commenting on the Senate's amendment (No. 139) states:

> "This amendment amends Section 20 of the Seamen's Act so as to extend the Federal Employers' Liability Act to cases of personal injury *to or death of* seamen" (Cong. Record, Vol. 59, part 8, p. 8409, 66th Cong., 2nd Session, June 3, 1920).

Had Congress intended to provide in the *Jones Act* a death statute comprehensive enough to cover all cases whether arising by reason of tort or contract, it would have been a simple matter to use the broad language contained in *"An act relating to the maintenance of actions for death on the high seas"* (Mar. 30, 1920, c. 111, §1, 41 Stat. 537). In this Act, passed less than three months before the *Jones Act,* the language used is

> "Whenever the death of a person shall be caused by wrongful act, neglect *or default* occurring on the high seas * * * the personal representative of the decedent may maintain a suit for damages * * * against the vessel, person or corporation which would have been liable if death had not ensued." (Italics ours.)

The words "or default" could be properly construed to cover liability for failure to comply with a contractual duty to provide medical treatment. It is certainly significant on the question of the intent of Congress, that the *Jones Act,* dealing with a closely related subject, does not include the comprehensive language of the "Death on the high seas" Act.

In *Lindgren, Admr.* v. *The United States,* 281 U. S. 38, this Court, speaking of the Jones Act, Section 33, said:

> "By this act, as heretofore construed by this court, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Federal Employers' Liability Act and its amendments, and permitting these new and substantive rights to be asserted and enforced in actions *in personam* against the employers in Fed-

eral and State courts administering common law remedies, or, in suits in Admiralty, in courts administering maritime remedies.

* * * * * * *

1. Prior to the adoption of the Merchant Marine Act the general maritime law of the United States did not authorize any recovery of damages or indemnity for the death of a seaman, whether the injury was caused by the negligence of the owner or other members of the crew or the unseaworthiness of the vessel. See *The Harrisburg,* 119 U. S. 199; *The Osceola,* 189 U. S. 158, 175; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240.

* * * * * * *

By the Merchant Marine Act, however, the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted *from personal injuries* the right to maintain an action for damages in accordance with the provisions of the Federal Employers' Liability Act." (Italics ours.)

In *Pacific Steamship Co.* v. *Peterson,* 278 U. S. 130, this Court decided that the election given to seamen by the *Jones Act* is between an action to recover compensatory damages under the new rule for injuries caused by negligence and a suit to recover indemnity under the old rules for injuries occasioned by unseaworthiness, saying (pp. 136-139):

"Plainly, we think, the right under the new rule to compensatory damages for injuries caused by negligence is not an alternative of the right under the old rule to maintenance, cure and wages—which arises, quite independently of negligence, when the seaman falls sick or is injured

in the service of the ship, and grows out of that which was termed in *The Montezuma* (C. C. A.), 19 F. (2d) 355, 356, the 'personal indenture' created by the relation of the seaman to his vessel. * * * In short, the right to maintenance, cure and wages, implied in law as a contractual obligation arising out of the nature of the employment, is independent of the right to indemnity or compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative.

The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, *both grounded on tort,* that we think an election is to be made under the maritime law as modified by the statute. Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term. But, whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, *Baltimore S. S. Co.* v. *Phillips, supra,* 321, for which he is entitled to but one indemnity by way of compensatory damages.

Considered in the light of these several remedies and the extent of the inconsistency between them, we agree with the view expressed by the Supreme Court of Washington *that the statute*

was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages—to which it made no reference. And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness; and *that no election is required between the right to recover compensatory damages for a tortious injury under the new rule and the contractual right to maintenance, care and wages* under the old rules—the latter being a cumulative right in no sense inconsistent with, or an alternative of, the right to recover compensatory damages." (Italics ours.)

It seems clear from the foregoing that this Court considered that it was not the intention of Congress in the *Jones Act* to interfere with the long-established rules of "maintenance and cure" for seamen in cases of illness or accident.

In *Persson* v. *Gulf Refining Co.*, 228 App. Div. 366, a seaman brought suit for indemnity on two causes of action, the first for negligence in causing his injuries; the second for failing to provide him with cure for his injuries. Both Trial Court and the Appellate Division treated the first cause of action as under the Jones Act, and the second as wholly under the old maritime law. On appeal defendant assigned error in that plaintiff was not compelled to elect between the two. Held, that plaintiff could not be compelled to elect between the two causes of action, the first being under the Jones Act and

the second for compensatory damages for breach of the defendant's obligation to furnish to the plaintiff cure with reasonable promptness. The decision clearly indicates that neither of the Courts considered the cause of action for failure to provide a cure to be based on the Jones Act.

That the scope of relief under the Jones Act is limited by its terms to cases defined in the Employers' Liability Act, likewise appears from the decision of this Court in *Jamison* v. *Encarnacion*, 281 U. S. 635. In that case a longshoreman assaulted by his gang boss in the supposed course of his duties brought suit under the Jones Act. This Court stated (p. 639):

> "He is entitled to recover if within the meaning of Section 1 (of the Employers' Liability Act) his injuries resulted from the negligence of the foreman.
>
> The question is whether 'negligence' as there used includes the assault in question.
>
> The measure was adopted for the relief of a large class of persons employed in hazardous work in the service described. It abrogates the common law rule that makes every employee bear the risk of injury or death through the fault or negligence of fellow servants and applies the principle of *respondeat superior* (Sec. 1), eliminates the defense of contributory negligence and substitutes a rule of comparative negligence (Sec. 3), abolishes the defense of assumption of risk where the violation of a statute enacted for the safety of employees is a contributing cause (Sec. 4) and denounces all contracts, rules and regulations calculated to exempt the employer from liability created by the Act. Sec. 5.

> The reports of the House and Senate committees having the bill in charge condemn the fellow-servant rule as operating unjustly when applied to modern conditions in actions against carriers to recover damages for injury or death of their employees and show that a complete abrogation of that rule was intended."

The case at bar is based on the alleged non-performance of a duty to land plaintiff at some port or furnish medical treatment, or to take him to the hospital sooner than he was taken. Such charges are based on the theory that a contractual obligation was not performed.

In *Morris* v. *U. S.*, 3 F. (2d) 588, 591 (C. C. A., 2nd Circuit) a seaman suffered a hernia. No medical attendance was given him and he was not put ashore at an intermediate port where the vessel stopped. The Court said (p. 591):

> "Indeed, it was the duty of the captain of the vessel to obtain medical aid at the intermediate port of the Azores for the injured seaman if he had no means of affording medical attention on board. * * * Even though the captain was mistaken, and committed an error of judgment in believing that the appellant was shamming, this fact does not relieve the ship from the responsibility it owed to the seaman. *Unica* v. *U. S. supra.* The consequential damage due to the failure to afford medical aid and maintenance is a measure of damages which is to be awarded. Recoveries have been permitted for neglect to furnish the proper medical care and treatment in actions instituted for consequential damages. * * * The right of recovery for maintenance and cure

> does not allow recovery for pain and suffering or compensation for injury due to physical incapacity. * * * A right of action for damage for maltreatment is not pleaded here."

Obviously in the opinion of the Court the cause of action was founded on breach of a contract obligation rather than on a tort for two reasons: First because it held that even though the captain was only mistaken and committed an error of judgment (*i. e.,* even if there were no negligence), nevertheless, the ship was not relieved from the obligation to furnish cure; and second, because in a tort action recovery for pain and suffering would be allowed, whereas it was disallowed by the court for the reason that the remedy for maintenance and cure does not allow it.

The cause of action arose subsequent to the *Jones Act* and the libel was *in personam.* The Court could therefore have applied the *Jones Act* had it considered the cause of action as one founded in tort.

In *The Hanna Nielsen,* 273 F. 171 (C. C. A., 2d Circ.) a libel was filed by a seaman on a Norwegian vessel for injuries and/or cure and maintenance. The District Court dismissed the claim for injuries but allowed cure and maintenance. The Circuit Court of Appeals directed the dismissal of the libel *in toto* on the ground that the right to cure and maintenance was contractual and therefore governed by the Norwegian law, with which it had been proved the ship complied.

In *Cresci* v. *Standard Fisheries et al.,* 7 F. (2d) 378, (N. D. Cal.) Kerrigan, *J.*, held that a seaman's libel for wages, maintenance and cure was based on contract and therefore was not barred by the statute of limitations

of California, Section 340, sub-division 3, prescribing one year limitation for tort actions such as actions for injury to or for the death of one caused by wrongful act or neglect, saying (pp. 378, 379):

> "The latter (actions for maintenance and cure) are, as stated, in reality actions for breach of contract. Although the articles may be wholly silent upon such points, law and reason imply certain obligations on the part of the master and owner to the mariner, which are equally imperative as those expressed in writing. * * *
>
> In every case, the duty arises by implication of law out of the relation of master and mariner, or that of owner and seaman. Since these are relations created by contract, the duty itself must be held to arise from a like source; for the incidents of a relation are inseparable from the relation itself."

In *Willey* v. *Alaska Packers' Association,* 9 F. (2d) 937 (affirmed 18 F. (2d) 8) (N. D. Cal.) it was held that the owner's failure to furnish medical attention to a seaman as agreed upon in his contract did not give the seaman's executor a right of action for death "by wrongful act or neglect" as provided by the California Death Act, which applies only to torts; also that the Federal Employers' Liability Act creates a liability in tort and not on contract, and that a tort action does not lie for an omission to perform a contractual duty even if wilful, but there must be some active negligence or misfeasance. The Court said (p. 938):

> "That section, however, by its express terms is applicable only to cases of 'death * * * caused by the wrongful act or neglect of another'; in

other words, to cases of tort and not of contract. Thus construed, it has no possible reference to the instant case, where no positive wrong on the part of respondent has been alleged, and where the only affirmative duty shown to have been omitted was wholly contractual. The fact that this duty, in addition to being within the terms of a written contract, also was imposed by federal statute, in no way changes the situation. As I held in *Cresci* v. *Standard Fisheries Co.* 7 F. (2d) 378, a vessel owner's statutory obligation to furnish maintenance and cure is only one of the incidents which the law affixes to every contract of marine employment, and breach of it creates a liability which in its essence is wholly dependent on contract. The libel, therefore, does not state a cause of action for death 'by wrongful act or neglect', within the meaning of the Code section above referred to."

and on re-hearing (p. 939):

"Section 1 of the federal Employers' Liability Act (Comp. St. Sec. 8657), to which my attention has been directed, creates rights of action for 'death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of (a) carrier, or by reason of any defect or insufficiency, due to its *negligence*. * * *' Here the word 'wrongful' has been left out; but in my opinion its omission produces no different result, for the liability intended to be created, like that under the California Code, is purely one in tort."

"Libelant maintains that under this act the liability for injuries incurred by railroad employees (and seamen) in each case rises out of

a contract of employment, and hence that the contractual origin of the duty said to have been violated here is immaterial. This amounts to saying that as a result of the act the law implies, as a term of the contract of employment, an agreement that the employer's agents, officers, and other representatives will take due care not to injure the employee, and to say the least is artificial. Furthermore, the history of the act, traceable in reported cases, shows that Congress intended to *add* no such legal implication to the contract."

"'The federal Employers' Liability Act is an act, as its name imports, to regulate the liability of employers, and, as its body shows, is applicable only to liability in tort for negligence. *No new right of action is given;* all that is done is to take away certain defenses which had come to be thought unjust. *The legal liability of the employer under the act does not depend upon the terms of the contract of service, and is neither increased nor diminished thereby.' Rounsaville* v. *Central Ry. Co.* 87 N. J. Law, 371, 94 A. 392."

"Libelant answers this by saying that the instant case actually is one of negligence, and that, because negligence results in tort, a recovery may be allowed. If such be the rule, then every negligent breach of contract must be a tort, for the decedent in this case was injured through the active fault of no one but himself, and the only affirmative duty alleged to have been omitted by respondent, depends entirely upon a contractual obligation.

* * * * * * * *

But one authority has been discovered which is on all fours with the present case. *Galveston, Houston & Southern Railway Co.* v. *Hennegan,*

33 Tex. Civ. App. 314, 76 S. W. 452, 453. There it was held in a carefully reasoned opinion, that where an employer fails to furnish an employee with medical attention, as he has agreed to do, the employee's cause of action is for breach of contract, and not in tort for negligence. Cooley, Pollock, Shearman & Redfield, and Bishop are shown to be as one upon the question. An omission to perform a contract may not be treated as negligence. The case is directly in point and decisive." (Italics ours.)

POINT III.

Failure to furnish cure is a failure to perform a contract obligation as heretofore shown and therefore cannot be negligence under the Jones Act.

Even though it be granted that an act of misfeasance or malfeasance in the performance of a contractual obligation after such performance has been begun constitutes a tort (and this is not always so, for negligent conduct of professional business intrusted to an attorney is a breach of contractual duty, on which the statute of limitations begins to run when the failure of duty occurs, though it may cause no damage until later [see Williston on Contracts, Vol. III, §2037]), yet it is well settled that nonfeasance, being an omission to act even though a duty so to do has been assumed by contract or implied in law, is only a breach of contract and cannot constitute a tort.

Thus, the failure of an employer to furnish medical attendance to an employee, in violation of an agreement

to do this, is a breach of contract, and the employee has no cause of action in tort for negligence. *Galveston, etc., R. R. Co.* v. *Hennegan,* 33 Tex. Civ. App. 314, 76 S. W. 452.

Where a physician who has contracted to treat a person's family for a year refuses to visit a member of the family when sent for, or to undertake the case, the right of action against him is for breach of contract only, and not for tort. *Randolph* v. *Snyder* (Ky., 1910), 129 S. W. 562.

Where plaintiff delivered his horse to defendant, a livery stable keeper, and it was alleged that defendant had neglected to take due and proper care (which was an implied term in the contract), by reason whereof the said horse was kicked by other horses, it was held that there was no cause of action independent of the contract. *Legge* v. *Tucker,* 1 H. & N. 500, 2 Jur. N. S. 1235, 26 L. J. Exch. 71, 5 Weekly Rep. 78.

In *Boorman* v. *Brown,* 3 Q. B. 511, 2 G. & D. 793, 11 L. J. Exch. 437, 43 E. C. L. 843, 114 Eng. Reprint 603, aff'd in 11 Cl. & F. 1, 8 Eng. Reprint 1003, plaintiffs sued a broker, retained by them to sell oil, in an action on the case, alleging that in selling the oil for plaintiffs to a third person defendant had failed to use reasonable diligence and care, and contriving and intending to injure plaintiffs, had delivered the oil to the purchaser without requiring cash payment. It was held that the duty of defendant arose from an express contract, and the action could not be in tort.

As was held in *Schick* v. *Fleischhauer,* 26 App. Div. 210, 49 N. Y. S. 962 (cited in Petitioner's Brief, p. 15),

a tenant cannot recover in tort against his landlord for a personal injury due to the landlord's failure to make repairs as provided by contract, unless there is some other breach of duty than the mere failure to perform the covenant to repair.

A complaint in case, alleging that plaintiffs engaged defendants to prepare the remains of her husband for burial and shipment by a certain train to leave at a specified hour and that when this hour arrived the defendant had made no preparation for the shipment of the remains at this time, was held insufficient in that there was no duty, independent of contract, to perform the obligation, and that no consideration was alleged for any contract. *Newton* v. *Brook*, 134 Ala. 269, 32 So. 722.

On the other hand, in *Taylor* v. *Manchester, etc., R. R. Co.* [1895], 1 Q. B. 134, 59 J. P. 100, 64 L. J. Q. B. 6, 71 L. T. Rep. N. S. 596, 14 Reports 34, 11 T. L. R. 27, 43 Weekly Rep. 120, plaintiff, a passenger on defendant's railroad, was injured by the act of the latter's servant in slamming a door. It was held that "that which caused the injury was not an act of omission, it was not a mere nonfeasance; it was not merely the not taking care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract he could maintain an action for that."

The cases cited in petitioner's brief, Point III granting that they are correctly decided, are all consistent with the principle enunciated above.

The quotation from *Osgoodby* v. *Talmadge,* 45 F. (2d) 696, set out in petitioner's brief, page 13, is ob-

viously dictum. The real holding of the decision is that a promisor is not liable in tort "if he 'maliciously' throws obstacles in the way of the promisee to prevent his performance and 'maliciously' himself fails to perform." The terms of the contract were that defendant agreed to sell to plaintiff certain land for $15,000 payable in installments, that plaintiff should improve the property and resell portions thereof from time to time, and that defendant should deliver deeds to plaintiff's vendees upon receiving the agreed prices for lots so conveyed. The Court said:

> "The other acts complained of, namely, selling the railroad right of way, recording the plat which dedicated streets, and refusing to convey the remainder of the property covered by the contract after payment in full, were, if invasions of plaintiff's rights at all, merely breaches of contract, for which no recovery could be had in an action in tort."

This same case explained and criticized the decision in *Rich* v. *N. Y. C. & H. R. R. Co.*, 87 N. Y. 382, relied upon by petitioner in his brief, page 14. It appears from this explanation that the railroad's violation of a contract with Rich to open a depot on a site adjacent to his property, for the purpose of depressing the value of Rich's property in order to eliminate his opposition to closing a street, was a breach of contract for which no action in tort would lie. The Circuit Court of Appeals added:

> "The *Rich* case can stand for no more than its actual holding, and we need not now consider whether this court would approve the holding, or be bound in any event to follow it."

The decision in *Attleboro Mfg. Co.* v. *Frankfort Marine, etc., Ins. Co.*, 240 Fed. 573 (Petitioner's Brief, pp. 14, 15), was not based upon the negligent performance of a contractual duty. The Court there said (p. 582):

> "As each count sounds in tort, and is based upon a duty imposed by law, it is wholly immaterial whether the defendant was or was not under a contractual duty to prepare and defend the suit or to settle the same."

And at page 579:

> "The claim is that, having actively intervened in the defense of the suit and in the settlement thereof, it was under a duty imposed by law to exercise due care not to injure the plaintiff's rights in what it did, and we so hold."

The Western States, 151 Fed. 929, aff'd. 159 Fed. 354 (Petitioner's Brief, p. 15). In this case it does not appear whether the action was in contract or in tort, and it was unnecessary to decide the question. From the language of the District Court it may be inferred that the ground of the liability was breach of contract.

Schick v. *Fleischhauer*, 26 App. Div. 210, 49 N. Y. S. 962 (Petitioner's Brief, p. 15), as pointed out above, supports the respondent's contention.

The same is to be said of *Franklin Fire Ins. Co.* v. *Weinberg*, 110 Misc. 644, 181 N. Y. S. 15 (Petitioner's Brief, p. 15).

Kennedy v. *F. W. Woolworth Co.*, 205 App. Div. 648, 200 N. Y. S. 121 (Petitioner's Brief, p. 15), must be re-

garded as an erroneous decision and in conflict with the rule of *Chysky* v. *Drake Brothers Co.*, 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533, holding that the manufacturer or seller of food or other articles of personal property is not liable under an implied warranty to third persons who have no contractual relations with him.

In *Montreal* v. *De Montigny*, 11 Que. Pr. 273, 275, it was held that "personal wrong" does not include wrongs or injuries arising from contract.

POINT IV.

The proofs utterly fail to show that the death of Santiago was caused by the breach of any of defendant's obligations.

The Circuit Court of Appeals expressly withheld judgment as to whether causation had been proved and assumed it only for the purpose of argument. The complaint charged cold and unsanitary quarters and insufficient bedding, failure to furnish proper and sufficient food and failure to keep Santiago in the hospital room aft; also failure to obtain aid from passing vessels and failure to obtain medical assistance earlier.

Charge of cold quarters:

This vessel sailed from the tropics in October and the temperature on the voyage averaged about 80° Fahrenheit until the day before arrival off Staten Island, when it ranged between 60 and 78. The expert testimony showed that pneumonia patients need all the fresh air

possible, with windows down from the top, even in severe cold weather and damp rainy weather (R. 89, 174). There was no request by anybody for heat in the forecastle and none was needed (R. 155, 136, 196, 200, 204).

Charge of unsanitary forecastle:

Much ado was made about the presence of some salt water on the floor. The uncontradicted testimony showed that that would have no effect upon the course of Santiago's disease (R. 170). Santiago insisted upon keeping his clothing on and had ample bedding (R. 191, 175). There was absolutely no testimony that the bedding had any effect on the disease.

Failure to keep Santiago in the hospital room:

This room was intended for contagious diseases and Santiago was kept in the forecastle so that the men there could give him better treatment than if he were alone in the after part of the ship. No attempt was made to show that this had anything to do with Santiago's death (R. 174, 125).

Failure to furnish proper food:

Santiago received soup or broth and orange juice which is almost the exact diet prescribed by plaintiff's doctor, Kienzle (R. 82, 120, 153, 158, 196, 200).

Failure to obtain aid from passing vessels or more prompt medical assistance after arrival off Staten Island:

After leaving Point Jupiter in Florida the vessel then put out to sea following the Gulf Stream (R. 161).

Santiago had then been ill only about 24 hours and the ship's officers thought he was suffering from a grippe cold. There was no evidence of passing other vessels after leaving Point Jupiter. The evidence does not show that it would have been better to transfer Santiago to another vessel. Upon arrival at New York Harbor the master and officers never appreciated that Santiago was suffering from pneumonia, especially when the man became ill off Florida with the thermometer at about 80°. Plaintiff's own doctor stated that the symptoms described might indicate a number of other ills, not particularly pneumonia even to a doctor. Santiago's temperature became lower on arrival off Staten Island. Both the master and third officer, Jounse, saw Santiago on deck on October 21st and thought he was getting better (R. 123, 153). Plaintiff's doctor, Kienzle, only gave him a "chance of 88 out of 100 of surviving" (R. 100) and that meant with modern hospital treatment, use of serum, special diet, alcohol baths and based upon the patient entering the hospital within 24 hours after he first became ill (R. 101). Moreover Dr. Kienzle's testimony fairly establishes that the type of pneumonia in this case was the Friedlander bacillus type (R. 68). Dr. Kienzle, however, had not much experience, apparently, with pneumonia and did not know that serum is never given in the Friedlander type, as was amply shown by the testimony of Dr. Baldwin, a pneumonia specialist at the New York Hospital (R. 164, 165, 185). Moreover, Dr. Baldwin and Dr. Cornell testified that mortality in the Friedlander type runs from 70 to 90% and is usually fatal so that Santiago was doomed by the nature of his illness rather than by any failure to receive medical treatment (R. 182).

The District court was therefore in error in per-

mitting the jury to speculate as to whether his death was caused by the infection or by the lack of hospital treatment.

Ford v. *McAdoo*, 231 N. Y. 155;
White v. *Lehigh Valley R. R. Co.*, 220 N. Y. 131.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

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Dated, March 17, 1932.